STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 27, 2014
v	No. 314584 St. Clair Circuit Court
SEMAJAI FAZRON SHAW, Defendant-Appellant.	LC No. 12-001455-FH

Before: MARKEY, P.J., and SAWYER and WILDER, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of assault with intent to rob while unarmed, MCL 750.88, malicious destruction of property (MDOP) with a value of more than $1,000 but less than $20,000, MCL 750.377a(1)(b)(*i*), and assaulting, resisting, or obstructing a police officer, MCL 750.81d(1). Defendant was sentenced to 4 to 15 years for his assault with intent to rob unarmed conviction, three to five years for his MDOP conviction, and one to two years for his assaulting, resisting, or obstructing a police officer conviction. We affirm.

Defendant first argues that the prosecution failed to present necessary sufficient evidence to convict defendant beyond a reasonable doubt, for assault with intent to rob while unarmed and assaulting, resisting, or obstructing a police officer. We disagree.

A claim of insufficient evidence in a criminal trial is reviewed de novo on appeal. *People v Kissner*, 292 Mich App 526, 533; 808 NW2d 522 (2011). In determining whether sufficient evidence was presented at trial to sustain defendant's conviction, this Court must consider the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could have found defendant guilty beyond a reasonable doubt. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010).

I. ASSAULT WITH INTENT TO ROB WHILE UNARMED

In order to sufficiently establish assault with intent to rob while unarmed, the prosecution must prove beyond a reasonable doubt: "(1) an assault with force and violence, (2) an intent to rob and steal, and (3) defendant being unarmed." *People v Chandler*, 201 Mich App 611, 614; 506 NW2d 882 (1993). Defendant neither disputes the fact that an assault occurred with force and violence nor the fact that he was unarmed. Defendant, however, does contend that the prosecution did not prove the intent element beyond a reasonable doubt. Robbery requires intent

to "permanently deprive the owner of his property." *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). The prosecution can prove a defendant's intent through all the facts and circumstances. *Kissner*, 292 Mich App at 534.

Here, the victim, David Davenport's, testimony, and the security videotape evidence indicated that defendant and codefendant, Princeton Martez Hinkins, either removed items from Davenport's vehicle or picked items off the ground that had been inside the vehicle. Defendant denied this fact, stating that he did not remove anything from Davenport's vehicle. This element became a credibility question, i.e., whether the jury believed Davenport's testimony that he observed defendant carrying items from his vehicle, or defendant's testimony that he did not remove any items from Davenport's vehicle. This credibility issue is not for this Court to resolve; it is an issue that remains for the trier of fact. *Id*. In this case, the jury found Davenport's testimony to be more credible than defendant's, and this Court will not interfere with that finding. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could, and did, find that defendant not only assaulted Davenport with force and violence, but also that he also intended to rob and steal property from Davenport and to permanently keep it.

The prosecution also presented the alternative theory that defendant, at the very least, aided and abetted Hinkins in the assault with intent to rob while unarmed, and the jury was instructed accordingly. The elements of proving aiding and abetting are:

> (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [*People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (Citations omitted).]

Again, the jury was presented with sufficient evidence to convict defendant of aiding and abetting an assault with the intent to rob while unarmed. "An aider and abetter's knowledge of the principal's intent can be inferred from the facts and circumstances surrounding an event." *People v Bennett*, 290 Mich App 465, 474; 802 NW2d 627 (2010).

Defendant contends that Hinkins acted alone in removing items from Davenport's car, that he did not have knowledge of Hinkins's intent, and that he did not assist Hinkins in any way. But resolution of this issue also requires weighing the credibility of the witness testimony. Davenport clearly testified that while defendant was punching him in the face, Hinkins said something to defendant about checking Davenport's pockets. Hinkins did then attempt to check his pockets. A rational trier of fact could infer that, at the very least, at that point defendant was aware of Hinkins's intent to rob and steal from Davenport. The jury determined that Davenport's testimony was credible regarding defendant's role in the offense and his knowledge of Hinkins's intent, and that is a determination this Court will not disturb. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Further, the evidence established an inference that defendant assisted Hinkins in committing the offense by punching Davenport and driving him out of his vehicle. This enabled Hinkins to remove several items from Davenport's vehicle. Thus, the prosecution presented sufficient evidence for a rational jury to find that either

defendant or Hinkins committed the offense and that defendant aided Hinkins in the commission of the offense with knowledge of Hinkins's intent to commit it.

II. ASSAULTING, RESISTING, OR OBSTRUCTING A POLICE OFFICER

Next, the prosecution must establish beyond a reasonable doubt that "(1) the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer, and (2) the defendant knew or had reason to know that the person that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his or her duties." *People v Corr*, 287 Mich App 499, 503; 788 NW2d 860 (2010) (relying on MCL 750.81d(1)). "Obstruct includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command." MCL 750.81d(7)(a).

The prosecution presented sufficient evidence beyond a reasonable doubt to convict defendant of obstructing a police officer. Defendant does not dispute that St. Clair County Sheriff's Deputy David Ferguson was a police officer performing his duties. But defendant argues that the prosecution failed to present evidence of resisting or assaulting Ferguson. Defendant fails to discuss obstruction, but the prosecution presented sufficient evidence to prove that defendant obstructed Ferguson in performing his duties. Here, defendant failed to comply with a lawful command of Ferguson. MCL 750.81d(7)(a). Ferguson lawfully requested defendant's personal information and he knowingly gave him a false name, apparently hoping to avoid arrest. This false information clearly impeded the police investigation because the police were initially unable to identify defendant. Ferguson's testimony and his admissions of offering false information were sufficient to find beyond a reasonable doubt that defendant was guilty of obstructing a police officer.

II. SENTENCE GUIDELINES

Next, defendant argues that the trial court erred by assessing 10 points for offense variable (OV) 4 and 10 points for OV 14 because there was insufficient evidence in the record to justify those scores. We disagree.

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*.

A. OV 4

OV 4, MCL 777.34, concerns psychological injury to a victim. The trial court is required to score 10 points for OV 4 if serious psychological injury requires or may require professional treatment. MCL 777.34(1)(a), (2); *People v Lockett*, 295 Mich App 165, 182-183; 814 NW2d 295 (2012). A victim's statements about feeling angry, hurt, violated, or frightened may support a score of 10 points. *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012).

Davenport's statements regarding how the assault had affected his life were more than sufficient to justify the trial court's assessment of 10 points for OV 4. First, Davenport advised

the probation agent who prepared the presentence investigation report that "he is very much afraid to go to the party store, even go in public for that matter. He has not sought treatment at this time, but is unsure if he will in the future. He stated he was petrified." Further, the following colloquy occurred between the prosecutor and Davenport at the sentencing hearing:

> *Q.* And, Mr. Davenport, as far as mentally how this has impacted you, do you feel that you are different now than you were before?
>
> *A.* Oh, absolutely.
>
> *Q.* And can you tell the Judge why?
>
> *A.* I just – I'm more like – beforehand, I would think – you know, because I don't do nothing [sic]. Like, I stick to myself. I don't really talk to a lot of people. Now, I feel, like, more frightened, I guess you could say.
>
> *Q.* Has it impacted – has it affected you, like, wanting to go out in public at all?
>
> *A.* Oh, absolutely. Like every time I go to a party store, I'm more curious of who's around me and what's going on.
>
> *THE COURT.* Have any of your family or friends suggested that maybe you should see a counselor?
>
> *A.* My mother has suggested I should probably see a counselor.

This evidence was sufficient to assess 10 points for OV 4. *Williams*, 298 Mich App at 124. The fact that Davenport had not yet sought treatment was not conclusive evidence of a lack of psychological injury. *Lockett*, 295 Mich App at 182-183. Instead, the preponderance of evidence supported that Davenport may require professional treatment in the future. MCL 777.34(2); *Hardy*, 494 Mich at 438.

B. OV 14

The trial court also assessed 10 points for OV 14, MCL 777.44, which addresses the offender's role in the offense. The statute specifies that 10 points should be assessed in the offender was "a leader in a multiple offender situation." MCL 777.44(1)(a).

A preponderance of evidence supported the trial court assessing 10 points for OV 14. The trial court, based on the evidence at trial, specifically held regarding defendant:

> that there were multiple individuals involved, based upon the jury's determination, and as a result, inasmuch as he struck the first blow and initiated the process. I believe that he did take the leadership role here. The co-defendant came on to the location shortly after this first punch was struck.

Defendant contends that there was insufficient evidence to establish that he was the leader during the offense. We disagree. There was evidence to indicate that defendant was the leader of the offense overall. Davenport testified that defendant approached him first, and Hinkins hung back. Defendant initiated contact with Davenport by grabbing his vehicle door and punching him in the face. Moreover, Davenport testified that Hinkins walked up to the vehicle to check Davenport's pockets once defendant had started punching Davenport in the face. Defendant also attempted to approach Davenport a second time, threatening him, after Davenport had retreated back into the party store. Defendant did not take a passive role, but instead, this testimony indicates that defendant instigated the offense. Thus, there was sufficient evidence to establish that defendant was the leader in the assault. *Hardy*, 494 Mich at 438. And the trial court did not err in assessing OV 14 at 10 points. Defendant is not entitled to resentencing.

We affirm.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kurtis T. Wilder